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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 257

JAY C. HORMEL, PETITIONER,

vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 19, 1940.

CERTIORARI GRANTED OCTOBER 14, 1940.

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United States Circuit Court of Appeals

EIGHTH CIRCUIT.

No. 11,565

TAX REVIEW.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE, PETITIONER,

vs.

JAY C. HORMEL, RESPONDENT.

ON PETITION TO REVIEW DECISION OF THE UNITED STATES BOARD OF TAX APPEALS.

FILED AUGUST 16, 1939.

INDEX.

	Original	Print
Docket entries	1	1
Petition of Jay C. Hormel	2	2
Exhibit A, Notice to Jay C. Hormel of deficiency in tax, February 19, 1938	5	5
Statement	6	6
Answer of Commissioner of Internal Revenue	13	12
Opinion of United States Board of Tax Appeals	15	13
Order of Redetermination, March 28, 1939	23	22
Petition of Guy T. Helvering, Commissioner of Internal Revenue for Review of Decision of United States Board of Tax Appeals	24	23

	Original	Print
Assignment of Errors	26	25
Notice of filing of Petition for Review and Service on Counsel for Respondent on Review	29	27
Notice of filing of Petition for Review and Service on Respondent on Review	30	27
Stipulation of Facts	31	28
Exhibit B, Agreement and Declaration of Trust No. 3 of Jay C. Hormel, July 16, 1934	34	30
Exhibit C, Agreement and Declaration of Trust No. 4 of Jay C. Hormel, July 16, 1934	38	32
Exhibit D, Agreement and Declaration of Trust No. 5 of Jay C. Hormel, July 16, 1934	41	35
Praecipe for Transcript	44	38
Clerk's Certificate to Transcript	46	39
Proceedings in U. S. Circuit Court of Appeals	40	40
Appearance of Mr. J. P. Wenchel and Mr. Ralph F. Staubly as Counsel for Petitioner	40	40
Appearance of Mr. Samuel O. Clark, Jr., and Mr. Sewall Key as Counsel for Petitioner	41	40
Appearance of Mr. L. W. Post as Counsel for Petitioner	41	41
Appearance of Counsel for Respondent	42	41
Order of Submission	42	41
Opinion, U. S. Circuit Court of Appeals	43	42
Decree, U. S. Circuit Court of Appeals	53	50
Clerk's Certificate to Transcript	54	51
Order allowing certiorari	55	52

Pleas and proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the March Term, 1940, of said Court, before the Honorable John B. Sanborn, the Honorable Seth Thomas and the Honorable Arba S. Van Valkenburgh, Circuit Judges.

Attest:

E. E. KOCH, Clerk,
Clerk of the United States
Circuit Court of Appeals for
the Eighth Circuit.

(Seal)

Be it Remembered that heretofore, to-wit: on the sixteenth day of August, A. D. 1939, a record on petition to review the decision of the United States Board of Tax Appeals was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in a certain matter wherein Guy T. Helvering, Commissioner of Internal Revenue, was Petitioner, and Jay C. Hormel was Respondent, which said record as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, is in the words and figures following, to-wit:

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[fol. 1] Docket Entries.

Jay C. Hormel, Petitioner,
Docket No. 93572. vs.
Commissioner of Internal Revenue, Respondent.

Appearances.

For Taxpayer: H. A. Mihills, Esq.

For Comm'r.: W. Frank Gibbs, Esq.

Transferred to Mr. Murdock 12/16/38.

1938

May 17—Petition received and filed. Taxpayer notified. (Fee paid)

" 17—Request for Circuit hearing in Washington, D. C. filed by taxpayer. 5/18/38 copy served.

" 18—Copy of petition served on General Counsel.

" 20—Answer filed by General Counsel. 5/24/38 copy served.

" 20—Motion to consolidate for hearing with Dockets 89114, 15, and 93571 week beginning June 20, 1938 at St. Paul, Minn. filed by General Counsel.

" 23—Hearing set June 20, 1938 in St. Paul, Minn.

" 24—Notice of filing and hearing motion beginning 6/20/38.

Jun. 27—Hearing had before Mr. Opper on merits. Counsel moves to consolidate with Dockets 89114, 15 and 93571—granted. June 23, 1938 motion to file amended petitions filed in Dockets 89114 and 89115. Copy of each served on respondent. June 27, 1938 answer to amended petitions filed in Dockets 89114 and 89115. Copy served in each on petitioner. Stipulation as to the facts filed in each docket number. Petitioner's brief due 7/27/38—respondent's due August 27, 1938 —reply Sept. 12, 1938.

Aug. 16—Transcript of hearing of June 27, 1938 filed.

" 17—Motion for leave to file the attached brief, brief lodged filed by taxpayer. 8/18/38 granted.

" 18—Copy of motion and brief served on General Counsel.

" 26—Reply brief filed by General Counsel.

1939

Jan. 30—Opinion rendered, John E. Murdock, Div. 3. Decision will be entered under Rule 50.

Mar. 2—Computation of deficiency filed by General Counsel.

" 6—Hearing set March 22, 1939 on settlement.

" 14—Consent to settlement filed by taxpayer.

" 28—Decision entered, J. E. Murdock, Div. 3.

Jun. 17—Petition for review by U. S. Circuit Court of Appeals (8) with assignments of error filed by General Counsel.

" 24—Proof of service filed by General Counsel. (Taxpayer)

" 26—Proof of service filed by General Counsel. (Attorney)

Aug. 4—Praecipe filed with proof of service thereon.

[fol. 2] (Petition of Jay C. Hormel.)

Filed May 17, 1938, U. S. Board of Tax Appeals.

United States Board of Tax Appeals

Jay C. Hormel, Petitioner,
Docket No. 93572. vs.
Commissioner of Internal Revenue, Respondent.

The above named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency (Bureau symbols IT:D:2 NP-90D) dated February 19, 1938, and as a basis of his proceeding alleges as follows:

1. The petitioner is an individual who maintains his residence at Austin, Minnesota.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on February 19, 1938.

3. The taxes in controversy are Federal income taxes for the calendar years 1934 and 1935 and in the amounts of $8,060.00 and $16,109.70, respectively.

4. The determination of tax set forth in the said notice of deficiency is based upon the following error:

(a) The Commissioner has erroneously included in petitioner's gross income for the calendar years 1934 and 1935 the amounts of $15,500.00 and $31,000.00 respectively, representing sums of dividends received by Jay C. Hormel Trusts Nos. 1, 3, 4, and 5.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) On July 16, 1934, petitioner created four trusts which were designated as Jay C. Hormel Trusts Nos. 1, 3, 4, and 5.

(b) To Jay C. Hormel and Park Dougherty, as joint trustees, were transferred shares of Geo. A. Hormel & Co. common stock, 25,000 shares for Trust No. 1 and 2,000 shares each for Trusts Nos. 3, 4, and 5.

(c) Under the terms of the Agreement establishing Trust No. 1, all income of the Trust, but not in excess of $25,000.00 annually, is to be paid to grantor's wife, Germaine D. Hormel. Annual income in excess of $25,000.00 is to be paid to grantor.

[fol. 3] (d) Provision is made for the termination of Trust No. 1 only upon the death of Germaine D. Hormel whereupon the corpus thereof automatically becomes the property of Jay C. Hormel, or of his heirs, in the event he has predeceased his wife.

(e) Under the Trust Agreement, all income received by Trust No. 3, but not exceeding $2,000.00 in any one year, is

to be paid to grantor's son, Geo. A. Hormel, II. To the same extent, the income received by each of Trusts Nos. 4 and 5 is to be paid to grantor's two other sons, Thomas D. Hormel and James C. Hormel, respectively. Income in excess of $2,000.00 received in any one year by either or all of Trusts Nos. 3, 4, and 5 is to be paid to Jay C. Hormel.

(f) The Agreements establishing Trusts Nos. 3, 4, and 5 provide that the income payable to the sons of the grantor shall be paid to Germaine D. Hormel, as guardian.

(g) Under the respective Trust Agreements, each of the three Trusts established for the benefit of petitioner's sons are to terminate at the expiration of three years from and after July 16, 1934, or upon the death of the son named as beneficiary, or at the death of the grantor, whichever occurs first. Upon the termination of said Trusts, the corpus of each is to revert to Jay C. Hormel, grantor, or his heirs.

(h) No provision is contained in any of the Trust Agreements establishing Trusts Nos. 1, 3, 4, and 5 for alteration, amendment, or revocation.

(i) During 1934, Trusts Nos. 1, 3, 4, and 5 received income of $12,500.00, $1,000.00, $1,000.00, and $1,000.00, respectively, and during 1935, income of $25,000.00, $2,000.00, $2,000.00 and $2,000.00, respectively. All of said income was distributed to the beneficiaries in accordance with the terms of the respective Trust Agreements and was included in their Federal income tax returns.

Wherefore, the petitioner prays that this Board may hear the proceeding and determine that petitioner is not subject to Federal income tax on income received by Trusts Nos. 1, 3, 4, and 5 during 1934 and 1935.

H. A. MIHILLS,
Counsel for the Petitioner,
917 Munsey Building,
Washington, D. C.

[fol. 4] State of Minnesota,
County of Mower—ss.

Jay C. Hormel, being duly sworn says that he is the petitioner above named; that he has read the foregoing peti-

tion, or had the same read to him, and is familiar with the statements contained therein, and that the statements contained therein are true.

JAY C. HORMEL.

Subscribed and sworn to before me this 23 day of April, 1938.

J. HELEN TURNER,
Notary Public.

[fol. 5] Exhibit A.

Treasury Department
Washington

February 19, 1938.

Mr. Jay C. Hormel,
Austin, Minnesota.

Sir:

You are advised that the determination of your income tax liability for the taxable years ended December 31, 1934, and 1935, discloses a deficiency of $24,169.70, as shown in the statement attached.

In accordance with section 272 (a) of the Revenue Act of 1934, notice is hereby given of the deficiency mentioned. Within ninety days (not counting Sunday or a legal holiday in the District of Columbia as the ninetieth day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C1:P-7. The signing and filing of this form will expedite the closing of your returns by permitting an early assessment of the deficiency and will prevent the accumulation of interest, since the interest period

terminates thirty days after filing the form, or on the date assessment is made, whichever is earlier.

Respectfully,

GUY T. HELVERING,
Commissioner.
By Chas. T. Russell,
Deputy Commissioner.

Enclosures:
Statement
Form 870

[fol. 6] Statement

IT:D:2
NP-90D

In re: Mr. Jay C. Hormel,
Austin, Minnesota.

Tax Liability for Taxable Years Ended
December 31, 1934, and 1935

Income Tax	Liability	Assessed	Deficiency
1934	$44,212.52	$36,152.52	$ 8,060.00
1935	45,431.65	29,321.95	16,109.70
Totals	$89,644.17	$65,474.47	$24,169.70

In making this determination of your income tax liability, careful consideration has been given to the internal revenue agent's reports dated July 10, 1936, and April 13, 1937, your protest for 1934 dated October 1, 1936, and to the statements made at the conference held on October 20, 1937.

If you do not acquiesce in all of the adjustments making up the deficiency indicated, but desire to stop the accumulation of interest on that part of the deficiency resulting from adjustments to which you agree, please fill out the enclosed form 870, inserting therein the amount of the deficiency you desire to have assessed at once. The execution of the form for the agreed portion of the deficiency will not deprive you of your right to petition the United States Board of Tax Appeals for a redetermination of the deficiency.

Copies of this letter have been mailed to your representatives, Mr. H. C. Utley, First National Soo Line Building, Minneapolis, Minnesota, and Mr. H. A. Mihills, Munsey Building, Washington, D. C., in accordance with the authority contained in the power of attorney executed by you and on file with the Bureau.

Adjustments to Net Income

1934

Net income as disclosed by return	$116,480.70
[fol. 7] Brought forward	$116,480.70
Unallowable deductions and additional income:	
(a) Dividends	15,500.00
Net income adjusted	$131,980.70

Explanation of Adjustment

(a) The revenue agent included in your net income the income of the four trust funds consisting entirely of dividends divided as follows:

	1934
Jay C. Hormel Trust No. 1	$12,500.00
Jay C. Hormel Trust No. 3	1,000.00
Jay C. Hormel Trust No. 4	1,000.00
Jay C. Hormel Trust No. 5	1,000.00
Total	$15,500.00

The revenue agent held such income to be taxable to you as grantor of the above revocable trusts.

The trust agreement of trust No. 1 provides that the trust will terminate upon the death of your wife, Germaine D. Hormel, the beneficiary, at which time the corpus automatically reverts to you or in the event you predecease the beneficiary, to your heirs.

The trust agreements of trusts Nos. 3, 4, and 5, provide that the income shall be paid to your wife, Germaine D. Hormel, as guardian of your three sons (apparent minors), such trusts to terminate at the expiration of three years from July 16, 1934, or upon the death of the son named as beneficiary or at the death of you, the grantor, which-

ever occurs first. The trust agreements further provide that upon the termination of the trusts the corpus automatically reverts to you, the grantor, or to your heirs, if you be deceased.

Section 166 of the Revenue Act of 1934 provides:

"Revocable Trusts.

"Where at any time the power to revest in the grantor title to any part of the corpus of the trust is vested—

"(1) in the grantor, either alone or in conjunction with [fol. 8] any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom, or

"(2) in any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom,

then the income of such part of the trust shall be included in computing the net income of the grantor."

Since it is the purpose of the Revenue Act of 1934, as provided in section 166, to tax the income to the grantor if at any time in the future the grantor or another not having a substantial adverse interest may, under power specifically vested by the trust instrument, revest title to the corpus of the trust in the grantor, it would seem to follow that the Revenue Act contemplates taxing the income to the grantor if, by the express terms of the trust instrument, title to the corpus will certainly revest in the grantor at the end of a comparatively short period.

There is in the opinion of this office no practical difference between the case where a grantor in terms has the power to revest in himself title to the corpus of the trust, and a case such as the instant case where the revesting of the corpus in the grantor in a subsequent year is assured by the express limitation on the terms of the trust indenture. This is the view taken in article 166-1 of Regulations 86, as amended by Treasury Decision 4629, XV-1, Cumulative Bulletin 140 (1936). Such article provides that section 166 of the Revenue Act of 1934 is not to be regarded as excluding from taxation to the grantor of the income of other trusts, not specified therein, in which the

grantor is, for the purposes of the Act, similarly regarded as remaining in substance the owner of the corpus. Such article defines "corpus" as "any part or the whole of the property, real or personal, constituting the subject matter of the trust". It contains the following provisions:

"The grantor is regarded as in substance the owner of the corpus, if, in view of the essential nature and purpose of the trust, it is apparent that the grantor has failed to [fol. 9] part permanently and definitively with the substantial incidents of ownership in the corpus.

"In determining whether the grantor is in substance the owner of the corpus, the Act has its own standard, which is a substantial one, dependent neither on the niceties of the particular conveyancing device used, nor on the technical description which the law of property gives to the estate or interest transferred to the trustees or beneficiaries of the trust. In that determination, among the material factors are: the fact that the corpus is to be returned to the grantor after a specific term: * * * (Underscoring supplied).

"Thus the grantor is regarded as being in substance the owner of the corpus if, in any case, the trust amounts to no more than an arrangement whereby the grantor, in the ordering of his affairs, finds it expedient to entrust for a period the title to, and custody or management of, certain of his property to a trustee, the income from such property to be used by the trustee during such period to make such expenditures which the grantor would customarily or ordinarily or naturally make and to which the grantor chooses to commit himself in advance, while the corpus is to be held intact, for return in due course to the grantor. In such a case, it is immaterial that, at the time of the creation of the Trust, an irrevocable disposition or consummated gift was made of those property rights which consist of the right to the expected future income of the corpus for the specified period. * * * (Underscoring supplied).

"(c) For example, a grantor is regarded as remaining in substance the owner of the corpus of the trust, if

he has placed it in trust for his son, John. (underscoring supplied.)

"(A) for the term of three years, at the end of which time the trust might be extended for a like period at the option of the grantor and successively thereafter, but in the absence of such extension the title is once more to revest in the grantor in possession and enjoyment; * * * (Underscoring supplied.)

[fol. 10] "In these typical cases the grantor is regarded as having retained the substantial incidents of ownership with respect to the income-producing property since the corpus will or may once more revest in himself in (A) upon the expiration of the trust period if the grantor does not exercise his option to extend the trust, * * *".

Article 166-1 further provides that the income of the trust is attributed and taxable to the grantor regardless of—

* * * * *

"(a) whether the exercise of such power is conditioned on the precedent giving of notice, or on the elapsing of a period of years, or on the happening of a specified event;

"(3) the time at which the title to the corpus will revest in the grantor in possession and enjoyment, whether such time is within the taxable year or not, or whether such time be fixed, determinable, or certain to come:

* * * * *"

In view of the above, it is the opinion of this office that, since you, the grantor, may revest title to the corpus of the trusts in yourself if you survive your wife, and at the end of three years with respect to the trusts for the three sons, they are revocable trusts under section 166 of the Revenue Act of 1934 and article 166-1 of Regulations 86 as amended by Treasury Decision 4629, and the income therefrom is taxable to you.

Computation of Tax

1934

Net income adjusted		$131,980.70
Less:		
Personal exemption	$2,500.00	
Credit for 3 dependents	1,200.00	3,700.00
Balance (surtax net income)		$128,280.70

[fol. 11]

Brought forward		$128,280.70
Less:		
Dividends	$89,216.75	
Earned income credit	1,400.00	90,616.75
Net income subject to normal tax		$ 37,663.95
Normal tax at 4% on $37,663.95		$ 1,506.56
Surtax on $128,280.70		42,705.96
Total tax		$ 44,212.52
Corrected income tax liability		$ 44,212.52
Income tax assessed, original, account #200319		36,152.52
Deficiency of income tax		$ 8,060.00

Adjustments to Net Income

1935

Net income as disclosed by return	$103,185.08
Unallowable deductions and additional income:	
(a) Dividends	31,000.00
Net income adjusted	$134,185.08

Explanation of Adjustment

(a) The revenue agent included in your net income the income of the four trust funds consisting entirely of dividends divided as follows:

	1935
Jay C. Hormel Trust No. 1	$25,000.00
Jay C. Hormel Trust No. 3	2,000.00
Jay C. Hormel Trust No. 4	2,000.00
Jay C. Hormel Trust No. 5	2,000.00
Total	$31,000.00

[fol. 12] The revenue agent held such income to be taxable to you as grantor of the above revocable trusts. See explanation for the year 1934 above.

Computation of Tax

1935

Net income adjusted		$134,185.08
Less:		
Personal exemption	$2,500.00	
Credit for 3 dependents	1,200.00	3,700.00
Balance (surtax net income)		$130,485.08
Less:		
Dividends	$89,599.80	
Earned income credit	1,400.00	90,999.80
Net income subject to normal tax		$ 39,485.28
Normal tax at 4% on $39,485.28		$ 1,579.41
Surtax on $130,485.08		43,852.24
Total tax		$ 45,431.65
Corrected income tax liability		$ 45,431.65
Income tax assessed, original, account #200621		29,321.95
Deficiency		$ 16,109.70

[fol. 13] (Answer of Commissioner of Internal Revenue.)

Filed May 20, 1938, United States Board of Tax Appeals.

United States Board of Tax Appeals.

Jay C. Hormel, Petitioner,
Docket No. 93572. vs.
Commissioner of Internal Revenue, Respondent.

Now comes the Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed in the above-entitled appeal, admits and denies as follows.

1, 2 and 3. Admits the allegations contained in paragraphs 1, 2 and 3.

4. Denies the Commissioner's determination of tax set forth in the deficiency notice is based upon the error alleged in paragraph 4.

5(a) and 5(b). Admits the allegations contained in paragraphs 5(a) and 5(b).

5(c) to 5(h). The allegations of fact contained in paragraphs 5(c) to 5(h) inclusive, relate to what is contained in a written instrument, a true copy of said document not being attached or made a part of the petition. Therefore, said allegations are denied and strict proof of said allegations is respectfully demanded by respondent.

5(i). Admits the allegations contained in paragraph 5(i).

6. Denies generally and specifically each and every allegation contained in taxpayer's petition, not hereinbefore admitted, qualified or denied.

[fol. 14] Wherefore, it is prayed that petitioner's appeal be denied and the respondent's determination be approved.

GWK.

J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue.

Of Counsel:

J. E. Marshall,
W. Frank Gibbs,
Special Attorneys,
Bureau of Internal Revenue.

WFG/dt-May 20/38.

[fol. 15] (Opinion of United States Board of Tax Appeals.)

Copies served on both parties.

United States Board of Tax Appeals.

Jay C. Hormel, Petitioner, vs. Commissioner of Internal Revenue, Respondent.

George A. Hormel, Petitioner, vs. Commissioner of Internal Revenue, Respondent.

Docket Nos. 89114, 89115, 93571, 93572. Promulgated January 31, 1939.

Income of trusts payable to the grantor's wife for life, with reversion to the grantor or his heirs, and income of trusts for a short period of years payable to the grantor's

wife, as guardian, but "for the use and benefit" of their minor children, held, not taxable to the grantor in the absence of a requirement that the income be used to support, maintain, or educate the beneficiaries.

H. A. Mihills, C. P. A., for the petitioners.

W. Frank Gibbs, Esq., for the respondent.

Opinion.

Murdock: The Commissioner determined deficiencies as follows:

J. C. Hormel

	Year	Deficiency	
		Tax	Amount
Docket No. 89114	1934	Gift tax	$9,044.12
Docket No. 93572	1934	Income tax	8,060.00
Do	1935	Income tax	16,109.70

George A. Hormel

Docket No. 89115	1934	Gift tax	$13,205.70
Docket No. 93571	1935	Income tax	13,780.00

The petitioners created several trusts in 1934 and filed gift tax returns reporting the transfers as subject to gift tax. Thereafter they did not include in their income the income of the trusts, which, under the terms of the trusts, was payable to others. The Commissioner has determined deficiencies in gift tax due to an increased valuation of the stock transferred and, at the same time, he has included the income of the trusts as a part of the income [fol. 16] of the grantors. The parties have agreed upon the value of the stock and the petitioners do not resist a gift tax in case the income is not taxable to them. The respondent seems to concede that the gift tax is due only in case the income is not taxable to the grantors. See Harriet W. Rosenau, 37 B. T. A. 468. The facts have been stipulated and are hereby found in accordance with the stipulation.

J. C. Hormel created a trust on July 16, 1934, and transferred shares of stock to that trust. He named himself and another as co-trustees and provided that all net dividends

up to, but not to exceed, the sum of $25,000 per year, were to be paid to his wife, Germaine D. Hormel, and all excess dividends were to be paid to himself. The trust was to terminate upon the death of the wife, at which time the corpus of the trust was to become the property of the grantor, his heirs, or persons named in his will. The grantor retained no power to revoke, alter, or amend the trust. George A. Hormel created a similar trust in 1934, under which he and his wife Lillian were the beneficiaries.

J. C. Hormel, on July 16, 1934, created three other trusts naming himself and another as trustees, and conveying to each trust some shares of stock. These trusts were similar to the trusts already mentioned with the following exceptions: Dividends up to, but not to exceed, $2,000 per year, in the case of each trust, were to be paid to the grantor's wife as guardian for one of their minor children, and the guardian was to receive the funds "for the use and benefit of" one of the children; excess dividends were to be paid to the grantor; and each trust "shall be automatically revoked and shall terminate at the expiration of three years from and after the date hereof" or upon the earlier death of either of the beneficiaries.

The explanation given in the deficiency notices for taxing to the grantors the income of the trusts which was payable to others, is that section 166 of the Revenue Act of 1934 applies. That section is entitled "Revocable Trusts" and provides:

> Where at any time the power to revest in the grantor title to any part of the corpus of the trust is vested—
>
> (1) in the grantor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom, or
>
> (2) in any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom,
>
> then the income of such part of the trust shall be included in computing the net income of the grantor.

Each of these trusts was irrevocable. At no time during the period of the existence of any trust was there vested

[fol. 17] in the grantor, either alone or in conjunction with any other person not having a substantial adverse interest, or in any person not having a substantial adverse interest, a power to revest title to any part of the corpus of the trust in the grantor. The fact that title to the trust corpus was to revest in the grantor or his heirs upon the termination of the trust does not serve to bring it within section 166. John Edward Rovensky, 37 B. T. A. 702; Meredith Wood, 37 B. T. A. 1065; Henry A. B. Dunning, 36 B. T. A. 1222. The trust in the Wood case was for a period of three years. The question of the applicability of section 166 was discussed in the above cited cases and requires no further discussion here. The respondent recognizes that those decisions are against him but argues that they should not be followed. However, we choose to follow them.

The respondent does not suggest that the line of cases beginning with Douglas vs. Willcuts, 296 U. S. 1, has any application to the income of the trusts payable to the wife, but he does argue that the principle of those decisions is applicable in the case of the income of the trusts for the benefit of the children, which income he says is taxable to the grantor under section 167. The Board has already considered a similar contention in the cases of Henry A. B. Dunning, supra, and Ralph L. Gray, 38 B. T. A. 584. We held in those cases that, where a grantor created a trust and provided that the income from the trust was payable to or for the use of a benficiary, without any restriction as to the use which might be made of the income, the income was not taxable to the grantor even though he owed a duty of support, maintenance, or education to the beneficiary. The Circuit Court of Appeals for the Second Circuit took the same view in Shanley vs. Bowers, 81 Fed. (2d) 13. We thus drew a distinction between such cases and cases like Douglas vs. Willcuts, supra; Helvering vs. Schweitzer, 296 U. S. 551; Helvering vs. Blumenthal, 296 U. S. 552; Helvering vs. Coxey, 297 U. S. 694; Helvering vs. Grosvenor, 85 Fed. (2d) 2, where the grantor expressly required that the income be used to discharge some obligation which he owed to the recipient. No authority is cited which has held that income is taxable to a grantor where he has failed to require that it be used to discharge an obligation of his. Cf. Hudson vs. Jones, 22 Fed. Supp. 938; E. E. Black, 36 B. T. A. 346; Martin F. Tiernan, Trustee, 37 B. T. A. 1048.

The trust instrument in the Gray case provided that the corpus of the trust was to be divided into three equal parts; one called the wife's share, another called the son's share, and another called the daughter's share. The following provision of the instrument relates to the use which was to be made of the income from the son's share until he reached [fol. 18] the age of 22, and there was a similar provision in regard to the income from the daughter's share:

The net income from the Son's Share shall be paid, quarter-annually as nearly as practicable, to the said Anna Marie Gray until such time as the son of the Settlor, Stewart Sill Gray, shall reach the age of twenty-two (22) years or until the death of the said Stewart Sill Gray if the said Stewart Sill Gray shall die before reaching the age of twenty-two (22) years, provided that if prior thereto, the said Anna Marie Gray shall die or the marriage relation between the said Anna Marie Gray and the Settlor shall be terminated, then from and after the date of her death or the date of such termination of said marriage relation, the net income shall be paid and/or expended for the benefit of the said son of the Settlor, Stewart Sill Gray, and/or accumulated all as hereinafter provided. So long as the said Stewart Sill Gray shall remain a minor, the Trustee shall have the discretion to pay the net income or such part thereof as the Trustee in his, its or their discretion shall determine and at such periods and in such installments as the Trustee in his, its or their discretion shall determine, to the natural guardian or the testamentary guardian or any other guardian or curator of the said Stewart Sill Gray and/or to expend so much thereof as the Trustee in his, its or their discretion shall determine for the use and benefit of the said Stewart Sill Gray and/or to accumulate so much of the net income as the Trustee in his, its or their discretion shall determine, such accumulated income, if any, to be later distributed or expended or to become a part of the principal of the Son's Share as the Trustee in his, its or their discretion shall determine. The Trustee's determination shall be final and conclusive upon all parties interested in the Trust Estate.

The income of the children's shares was to be paid to them directly after they became 22 years of age, and there were provisions for distribution of the principal to them

also. We held that the income was not taxable to the grantor.

The grantor here merely left the income for the use and benefit of his minor children. It is difficult to conceive how he could have placed less restriction on its use and at the same time have indicated that it was to be theirs alone. He did not require that the income be used for their maintenance, support, or education. Thus, it could have been used freely in any way whatsoever for their use and benefit, without violating the terms of the trust instrument. Although the present record does not show whether or not any of the income was actually used for their support, maintenance, and education, that circumstance is important only in contrast with the Dunning and Gray cases, where it appeared affirmatively that some of the income had been used voluntarily by the recipients for the support, maintenance, or education of the grantors' wives or children, and we nevertheless held that the income was not taxable to the grantor. We held, following the Dunning and Gray cases, that the income of these trusts was not taxable to the grantor. Cf. John Edward Rovensky, supra.

Cases have been presented to the Board involving trusts created for short periods where the grantor has reserved [fol. 19] to himself practically all of the substantial benefits as owner of the property, and the Board has held that such trusts are lacking in substance to such an extent that the income is taxable to the grantor. See Estate of A. C. O'Laughlin, 38 B. T. A. 1120, and cases there cited. The respondent does not argue that those cases are applicable here and obviously they are not, because here the trusts were not lacking in substance during the three years of their existence. In the case of each of these trusts the income was actually paid in accordance with the provisions of the trust instrument. They did not leave to the grantor any substantial rights and interest in, control over, or management of the trust property during the existence of the trusts. The grantor could not use the trust property for his own benefit or enjoyment. Thus, these trusts can not be disregarded and it can not be said that they fall within section 167 because a part of the income of the trusts might be distributed to the grantor or held for future distribution to him.

Reviewed by the Board.

Decisions will be entered under Rule 50.

Opper, dissenting: Section 167, Revenue Act of 1934, provides:

(a) Where any part of the income of a trust—

* * * * * *

(2) may, in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income, be distributed to the grantor;

* * * * * *

then such part of the income of the trust shall be included in computing the net income of the grantor.

A distribution for the grantor's benefit, as for example the payment of an obligation of support owed by him, is the equivalent of a distribution to him. Douglas vs. Willcuts, 296 U. S. 1; Helvering vs. Coxey, 297 U. S. 694; Commissioner vs. Grosvenor, 85 Fed. (2d) 2. Regulations 86 issued under the 1934 Act is declaratory of the same principle.[1]

[fol. 20] The wife here has no interest adverse to petitioner in the distribution of the income from the children's trusts. Reinecke vs. Smith, 289 U. S. 172. As the major-

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[1] ART. 167-1. *Trusts in the income of which the grantor retains an interest.*—

* * * * * * *

(b) * * * The test of the sufficiency of the grantor's retained interest in the trust income, * * * is whether the grantor has failed to divest himself, * * * of every right which might, by any possibility, enable him to have the income, at some time, distributed to him, actually or constructively. * * *

* * * * * * *

If the grantor has retained any such interest in the income, such income is taxable to the grantor regardless of—

* * * * * * *

(4) whether, if such distribution results in the inuring of benefits to the grantor from the application of the income in satisfaction of his legal obligation, such obligation is * * *, to support dependents, * * * to furnish maintenance, and support or otherwise;

* * * * * * *

ity opinion concedes, she could have expended it for the support of the grantor's infant children, for which he was responsible, Knutson vs. Haugen, 191 Mich. 420; 254 N. W. 464, with no resulting violation of her trust. Gasquet vs. Pollock, 1 (N. Y.) App. Div. 512; 37 N. Y. S. 357; see Bird vs. Newcomb (Va. 1938), 196 S. E. 605, and cases there cited. And if she did so it is clear as it was in E. E. Black, 36 B. T. A. 346; Martin F. Tiernan, 37 B. T. A. 1048, Hudson vs. Jones, 22 Fed. Supp. 938, and Commissioner vs. Grosvenor, supra, that to that extent at least the discharge of an obligation of the grantor would require that the income be treated as his. The petitioner "was responsible for the minor children's maintenance and support, so that the transfer * * * correspondingly relieved him of his statutory duty. Such relief made him, to that extent, a beneficiary. Savage vs. Commissioner (C. C. A.) 82 Fed. (2d) 92." Clark vs. Commissioner (C. C. A., 3d Cir.), 84 Fed. (2d) 725, 726.

The trusts for the benefit of petitioner's children thus fall squarely within the terms of the statute, as it has been construed, and of respondent's regulation. The statutory requirement that one thus benefited shall be taxed on that benefit has been relieved only to a limited degree; that is the extent to which a petitioner can show, first, that there was no agreement express or implied by the grantor and the guardian or trustee that any part of the income should be devoted to the discharge of the grantor's obligation of support, Henry A. B. Dunning, 36 B. T. A. 1222, 1231, 1232; and, second, that even if there be no such agreement the avails of the trust have not in fact been applied to any such purpose. E. E. Black, supra; Martin F. Tiernan, supra. While it may be conceded that there was no express provision in the trust deed, requiring that the income be spent to benefit the grantor, that was possible in the wife's discretion. On the authority of the cases last cited that evidence, of which the majority so easily disposes, was accordingly the pivotal, the controlling issue. For the sole fact which would foreclose a determination in favor of respondent would be that actually no part of the trust income was so used, a fact which, like any other, could have been proved, by petitioner. His omission leads logically to the inference that it was not the fact, and legally to the result that

his failure of proof requires affirmance of the respondent's determination. Commissioner vs. Grosvenor, supra.

This decision, therefore, seems to be nothing more than an overruling of the Black and Tiernan cases in favor of the supposed doctrine of Ralph L. Gray, 38 B. T. A. 584 [fol. 21] and Henry A. B. Dunning, supra. The confusion and inequity inevitable in any such result may be demonstrated by what has actually occurred in the history of those very proceedings. Not only was acquiescence in the Black decision announced by respondent (1937—2 C. B. 3), but on the strength of that decision respondent's counsel published an opinion to the effect that such trust income is taxable to the grantor only to the extent that it is actually distributed for the support of those to whom the grantor owes that duty. 1937—2 C. B. 231, G. C. M. 18972. And that opinion has been cited as authority by at least one District Court in a case very similar to this. Hudson vs. Jones, 22 Fed. Supp. 938.

Finally, the proposed conclusion finds no support in the Dunning and Gray cases on which the majority relies. The contrast made fundamental by the statute between the discretion of a beneficiary and that of a fiduciary, see Reinecke vs. Smith, supra, furnishes a complete distinction from anything in those cases, which, at least in their published form, are identical with each other in their facts and conclusions. The finding in the Gray case (p. 585) that "There is no provision anywhere in the trust instrument designating the manner in which any of the income shall be expended by the wife", is controlling, regardless of the unpublished record reproduced and reconstrued in the prevailing opinion. The San Simeon (C. C. A., 2d Cir.), 63 Fed. (2d) 798, 802. Thus, in both the Dunning and Gray cases the application of the income resided in the discretion of the wife, who was the beneficiary. That she chose to apply some part of the income to the expenses of the household was immaterial because the statute never came into operation. Her discretion was that of a person with "a substantial adverse interest." Here the wife, in whose discretion the income can be applied for the grantor's benefit, has no interest whatever adverse to the grantor.

The majority is quite evidently confusing the two independent factors which must be considered in cases of this

kind. It can not hold that payment of the children's maintenance is not constructive receipt by the grantor without disregarding Douglas vs. Willcuts, supra. On the other hand, it can not, without violating the express language of section 167, hold that such distribution to the grantor, being the result of a discretion exercised by one not adversely interested, is not taxable to the grantor. But it is enabled to reach its desired result by applying to a decision of the first question—the Douglas vs. Willcuts principle—cases where only the second question was involved, Henry A. B. Dunning and Ralph L. Gray, supra; and by disregarding the cases where the relevant issue was considered, E. E. Black and Martin F. Tiernan, supra.

For the reasons stated I am compelled to note my dissent from that part of the majority opinion which holds [fol. 22] that the income from the trusts for the benefit of the children is not taxable to petitioner. Had the opposite result been reached it would have been unnecessary to consider the further question of the effect of the short period for which these trusts were created. On this point I have grave doubts of the correctness of the prevailing opinion and it seems to me it is contrary to what we said not so long ago in Frances Marshall Canfield et al., Executors, 31 B. T. A. 724.

Turner, Mellott, Hill, Disney, Harron, and Kern agree with this dissent.

(Seal of U. S. Board of
Tax Appeals.)

[fol. 23] (Order of Redetermination, March 28, 1939.)

United States Board of Tax Appeals.

Jay C. Hormel, Petitioner,
Docket Nos. 89114, 93572 vs.
Commissioner of Internal Revenue, Respondent.

Decision.

The respondent, on March 2, 1939, filed a proposed computation pursuant to the Board's Opinion promulgated January 31, 1939. The petitioner, on March 14, 1939, filed

a notice of acquiescence to the respondent's computation, Therefore, it is

Ordered and Decided, that there is a deficiency in gift tax for the year 1934 in the amount of $4,570.27, and that there are no deficiencies in income tax for the year 1934 and 1935.

J. E. MURDOCK,
Member, United States
Board of Tax Appeals.

Enter:
Entered
March 28, 1939.

Seal
U. S. Board of
Tax Appeals
1924

[fol. 24] (Petition of Guy T. Helvering, Commissioner of Internal Revenue, for Review of Decision of United States Board of Tax Appeals.)

Filed June 17, 1939, United States Board of Tax Appeals.

In the United States Circuit Court of Appeals for the Eighth Circuit.

Guy T. Helvering, Commissioner of Internal Revenue,
Petitioner on Review,
B. T. A. Docket No. 93,572 vs.
Jay C. Hormel, Respondent on Review.

To the Honorable Judges of the United States Circuit Court of Appeals for the Eighth Circuit:

Now Comes Guy T. Helvering, Commissioner of Internal Revenue, by his attorneys, James W. Morris, Assistant Attorney General, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and Ralph F. Staubly, Special Attorney, Bureau of Internal Revenue, and respectfully shows:

I.

That he is the duly appointed, qualified and acting Commissioner of Internal Revenue, appointed and holding office by virtue of the laws of the United States; that Jay C.

Hormel (hereinafter referred to as the taxpayer), an individual, resides at Austin, Mower County, Minnesota; and that the income tax returns made by the taxpayer for the years 1934 and 1935, were filed with the Collector of Internal Revenue for the District of Minnesota, whose office is located in St. Paul, Minnesota, which is within the jurisdiction of the United States Circuit Court of Appeals for the Eighth Circuit.

[fol. 25] The Court in which the review of this proceeding is sought is the United States Circuit Court of Appeals for the Eighth Circuit.

II.

The nature of the controversy is as follows, to-wit:

The income tax returns filed by the taxpayer for the years 1934 and 1935 disclosed tax liabilities of $36,152.52 and $29,321.95, respectively. On July 16, 1934 the taxpayer established three short term trusts, known as the J. C. Hormel Trusts Numbers 3, 4 and 5. The income from said trusts was to be expended in the interest of the taxpayer's children, George A. Hormel, II, Thomas D. Hormel and James C. Hormel, as beneficiaries.

Under date of February 19, 1938 the Commissioner of Internal Revenue mailed a notice to the taxpayer, asserting deficiencies in his income tax liabilities for the years 1934 and 1935 in the amounts of $8,060.00 and $16,109.70, respectively. In determining said deficiencies the Commissioner included in the taxpayer's gross income for said years, the income from the aforesaid trusts.

Under date of May 17, 1938, the taxpayer filed a petition with the United States Board of Tax Appeals for a redetermination of the deficiencies in the tax, as determined by the Commissioner of Internal Revenue. After the answer of the Commissioner was filed, the case was duly submitted to the Board of Tax Appeals for decision. The interlocutory opinion and decision of the Board was pro-
[fol. 26] mulgated on January 31, 1939 and the final order of the Board, redetermining the deficiencies, was entered on March 28, 1939, in which it was ordered and decided that there were no deficiencies in income tax for the years 1934 and 1935.

The Board of Tax Appeals, in redetermining the deficiencies in tax as aforesaid, held and decided that the income from the aforesaid short term trusts, was not subject to be included in the gross income of the taxpayer for the years 1934 and 1935.

III:

The Commissioner of Internal Revenue being aggrieved by the conclusions of law contained in the decision of the Board of Tax Appeals and by its order of redetermination, desires to obtain a review thereof by the United States Circuit Court of Appeals for the Eighth Circuit.

The Commissioner's assignments of errors are as follows:

1. The Board of Tax Appeals erred in holding and deciding that the income from Trusts 3, 4 and 5, executed by the taxpayer on July 16, 1934, in the interest of his three sons as beneficiaries, was not subject to be included in the taxpayer's gross income for the years 1934 and 1935.

2. The Board of Tax Appeals erred in not holding and deciding that the income from Trusts 3, 4 and 5, as aforesaid, was subject to be included in the gross income of the taxpayer for the years 1934 and 1935, pursuant to the provisions of Section 166 of the Revenue Act of 1934.

3. The Board of Tax Appeals erred in not holding and deciding that the income from Trusts 3, 4 and 5, aforesaid, [fol. 27] was subject to be included in the gross income of the taxpayer for the years 1934 and 1935, pursuant to the provisions of Section 167 of the Revenue Act of 1934.

4. The Board of Tax Appeals erred in entering its final order of redetermination that there are no deficiencies in tax for the years 1934 and 1935.

5. The Board of Tax Appeals erred in failing and refusing to enter a final order of redetermination that there are deficiencies in the tax for the years 1934 and 1935 in the respective amounts of tax attributable to the inclusion in the gross income of the taxpayer of the income from the aforesaid trusts, expendable in the interest of the beneficiaries during said years.

6. The Board of Tax Appeals erred in that its decision is not supported by the evidence and is contrary to law.

Wherefore, the Commissioner petitions that the decision of the Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Eighth Circuit, that a transcript of the record be prepared in accordance with law and with the rules of said Court and transmitted to the Clerk of said Court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court.

JAMES W. MORRIS,
Assistant Attorney General.

J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue.

Of Counsel:

Ralph F. Staubly,
Special Attorney,
Bureau of Internal Revenue.

RFS-spt 6-17-39

[fol. 28] United States of America,
District of Columbia—ss.:

Ralph F. Staubly, being duly sworn, says that he is a Special Attorney in the Bureau of Internal Revenue, and as such is duly authorized to verify the foregoing petition for review; that he has read said petition and is familiar with the contents thereof; that said petition is true of his own knowledge except as to the matters therein alleged on information and belief, and as to those matters he believes it to be true.

RALPH F. STAUBLY,
Special Attorney, Bureau of Internal Revenue.

Sworn and subscribed to before me this 17th day of June, 1939.

MARCELLETTE TAYLOR,
Notary Public.

My commission expires April 1, 1940.

[fol. 29] (Notice of filing of Petition for Review and Service on Counsel for Respondent on Review.)

(Received and Filed June 24, 1939, United States Board of Tax Appeals.)

To:

H. A. Mihills, Esq.,
917 Munsey Bldg.,
Washington, D. C.

You are hereby notified that the Commissioner of Internal Revenue did, on the 17th day of June, 1939, file with the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Eighth Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 17th day of June, 1939.

RLW

J. P. WENCHEL,
Chief Counsel, Bureau of
Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors mentioned therein is hereby acknowledged this 20th day of June, 1939.

H. A. MIHILLS,
Attorney for Respondent on Review.

[fol. 30] (Notice of filing of Petition for Review and Service on Respondent on Review.)

(Received and Filed June 26, 1939, United States Board of Tax Appeals.)

To:

Jay C. Hormel,
Austin, Mower County, Minnesota.

You are hereby notified that the Commissioner of Internal Revenue did, on the 17th day of June, 1939, file with

the Clerk of the United States Board of Tax Appeals, at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Eighth Circuit, of the decision of the Board heretofore rendered in the above-entitled case. A copy of the petition for review and the assignments of error as filed is hereto attached and served upon you.

Dated this 17th day of June, 1939.

RLW

J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue.

Personal service of the above and foregoing notice, together with a copy of the petition for review and assignments of errors mentioned therein is hereby acknowledged this 20 day of June, 1939.

JAY C. HORMEL,
Respondent on Review.

[fol. 31] Stipulation of Facts.

(Filed at Hearing June 27, 1938, U. S. Board of Tax Appeals.)

United States Board of Tax Appeals

Jay C. Hormel, Petitioner,
Docket Nos. 89114 and 93572. vs.
Commissioner of Internal Revenue, Respondent.

It is hereby stipulated by and between the parties hereto by their respective attorneys of record that, for the purpose of this proceeding only, the following facts shall be taken as true and that the exhibits referred to herein and annexed hereto are hereby made a part of this stipulation and the facts therein stated shall be taken as true; and,

It is further stipulated and agreed that this stipulation shall be without prejudice to the right of either party to introduce further proof deemed material and pertinent and not in conflict with the facts here stipulated.

(1) The petitioner is an individual who is an officer of, and whose business address is c/o Geo. A. Hormel & Co., Austin, Minnesota.

(2) On July 16, 1934, petitioner transferred, as gifts in trust, 31,000 shares of common stock of Geo. A. Hormel & Co. (a Delaware corporation).

* * * * * * *

[fol. 32] (5) On July 16, 1934, petitioner created four trusts which were designated as Jay C. Hormel Trusts Nos. 1, 3, 4 and 5.

(6) To Jay C. Hormel and Park Dougherty, as joint trustees, were transferred shares of Geo. A. Hormel & Co. common stock, 25,000 shares for Trust No. 1 and 2,000 shares each for Trusts Nos. 3, 4 and 5, comprising the 31,000 shares referred to in paragraph (2) above, all of which more particularly appears by reference to Exhibits A, B, C, and D respectively, attached hereto and made a part hereof.

(7) During 1934, Trusts Nos. 1, 3, 4 and 5 received income of $12,500.00, $1,000.00, $1,000.00, and $1,000.00, respectively, and during 1935, income of $25,000.00, $2,000.00, $2,000.00, and $2,000.00, respectively. All of said income was distributed to the beneficiaries in accordance with the terms of the respective Trust Agreements and was included in their Federal income tax returns.

* * * * * * *

[fol. 33] (10) For income tax purposes the sole question involved for the Board to decide is whether any or all the items of income set forth in paragraph 7 of this stipulation are taxable to petitioner as determined by the respondent.

* * * * * * *

H. A. MIHILLS,
Counsel for Petitioner.
W.F.G.

J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue,
Counsel for Respondent.

[fol. 34] Exhibit B.

Agreement and Declaration of Trust No. 3.

The undersigned Jay C. Hormel does hereby create and declare the following described trust in the undersigned Park Dougherty and himself as co-trustees for the benefit of Jay C. Hormel, and Germaine D. Hormel, his wife, as guardian for their son George A. Hormel II. Jay C. Hormel is the owner of the securities listed in the attached schedule marked Exhibit A. He hereby agrees that said co-trustees shall receive and hold said securities and collect the dividends therefrom as a trust estate in trust for Germaine D. Hormel, as guardian of George A. Hormel II, and Jay C. Hormel, as sole beneficiaries, upon the terms and conditions following:

1. All the dividends from the trust estate received during the continuance of the trust hereby created shall be paid by the co-trustees to the beneficiaries on receipt thereof as follows: To Germaine D. Hormel, as guardian aforesaid, for the use and benefit of George A. Hormel II, all net dividends up to but not to exceed the sum of $2,000 per year from date hereof, and to Jay C. Hormel all net dividends in excess thereof.

2. Upon the termination of the trust the entire principal or corpus thereof shall be deemed and treated as property owned absolutely by Jay C. Hormel as of the same time, free and clear of all terms of this trust, and in the event of his decease previous thereto the share that would have reverted to him shall revert to the legatees and devisees of his last will and testament, or to his heirs at law should he leave no will.

3. During the continuance of the trust hereby created, the co-trustees shall retain and have full power and au- [fol. 35] thority to appoint proxies to exercise any and all voting powers under any certificates or shares of stock in the trust estate. The resignation of Park Dougherty as co-trustee may be required by the beneficiaries. In that event, or should he for any other reason be unable to act, his successor shall be chosen by agreement between Jay C. Hormel and Germaine D. Hormel, as guardian aforesaid.

4. Said trustees shall not be liable or responsible to the beneficiary Germaine D. Hormel, as guardian aforesaid, or to George A. Hormel II for any loss of any kind except in consequence of the wilful and deliberate violation of their duties as trustees herein.

5. Except as otherwise herein provided specifically to the contrary, no title in or to the trust estate or any dividends therefrom shall vest in the beneficiary Germaine D. Hormel, as guardian, or in George A. Hormel II, and neither the principal nor any future dividends shall be liable or in any manner chargeable for their debts and they shall have no power to sell, transfer, encumber or in any manner anticipate or dispose of any interest in the trust estate or any dividends therefrom prior to actual payment or delivery thereof by said trustees to said Germaine D. Hormel as guardian aforesaid.

6. The trust hereby created shall be automatically revoked and shall terminate at the expiration of three years from and after the date hereof or upon the death of the beneficiary George A. Hormel II or upon the death of Jay C. Hormel, whichever event occurs first. At no time before the termination of the trust shall said Jay C. Hormel or said co-trustees have the power to re-vest in Jay C. Hormel as beneficial owner any part of the corpus or prin-
[fol. 36] cipal of the trust or trust estate or the income therefrom other than as herein provided, or to revoke, alter or amend this instrument or the trust hereby ceated.

7. The word dividends herein shall be construed to include other income in event the stock certificates deposited at the inception of the trust are sold or substituted by securities other than dividend-bearing stock.

8. The co-trustees shall have power to pay out of the income such reasonable expenses as may be from time to time incurred in administering the trust. Jay C. Hormel shall receive no pay for services as trustee. His co-trustee shall be paid quarterly out of the income such reasonable sums for services as may be agreed upon between the trustees and the beneficiaries.

In Witness Whereof, We have hereto set our hands this 16th day of July, 1934.

JAY C. HORMEL,
PARK DOUGHERTY.

Signed in the Presence of:
Lydia Safranek
S. D. Catherwood

State of Minnesota,
County of Mower—ss.

On this 16th day of July, 1934, before me, a Notary Public within and for said County, personally appeared Jay C. Hormel and Park Dougherty, to me known to be the persons described in and who executed the foregoing instrument, and acknowledged that they executed the same as their voluntary act and deed.

(Signed and stamped) LYDIA SAFRANEK,
(Seal) Notary Public, Mower County, Minn.

My commission expires Sept. 1, 1937.

* * * * * *

[fol. 37] I, Germaine D. Hormel, as guardian on behalf of George A. Hormel II, the beneficiary named in the foregoing instrument, hereby acknowledge notice of the execution thereof and receipt of a true copy thereof.

Dated July 16, 1934.

GERMAINE D. HORMEL,
As Guardian of George A. Hormel II.

[fol. 38] Exhibit C.

Agreement and Declaration of Trust No. 4.

The undersigned Jay C. Hormel does hereby create and declare the following described trust in the undersigned Park Dougherty and himself as co-trustees for the benefit of Jay C. Hormel, and Germaine D. Hormel, his wife, as guardian for their son Thomas D. Hormel. Jay C. Hormel is the owner of the securities listed in the attached schedule marked Exhibit A. He hereby agrees that said co-trustees shall receive and hold said securities and collect the

dividends therefrom as a trust estate in trust for Germaine D. Hormel, as guardian of Thomas D. Hormel, and Jay C. Hormel, as sole beneficiaries, upon the terms and conditions following:

1. All the dividends from the trust estate received during the continuance of the trust hereby created shall be paid by the co-trustees to the beneficiaries on receipt thereof as follows: To Germaine D. Hormel, as guardian aforesaid, for the use and benefit of Thomas D. Hormel, all net dividends up to but not to exceed the sum of $2,000 per year from date hereof, and to Jay C. Hormel all net dividends in excess thereof.

2. Upon the termination of the trust the entire principal or corpus thereof shall be deemed and treated as property owned absolutely by Jay C. Hormel as of the same time, free and clear of all terms of this trust, and in the event of his decease previous thereto the share that would have reverted to him shall revert to the legatees and devisees of his last will and testament, or to his heirs at law should he leave no will.

3. During the continuance of the trust hereby created, the co-trustees shall retain and have full power and au- [fol. 39] thority to appoint proxies to exercise any and all voting powers under any certificates or shares of stock in the trust estate. The resignation of Park Dougherty as co-trustee may be required by the beneficiaries. In that event, or should he for any other reason be unable to act, his successor shall be chosen by agreement between Jay C. Hormel and Germaine D. Hormel, as guardian aforesaid.

4. Said trustees shall not be liable or responsible to the beneficiary Germaine D. Hormel, as guardian aforesaid, or to Thomas D. Hormel for any loss of any kind except in consequence of the wilful and deliberate violation of their duties as trustees herein.

5. Except as otherwise herein provided specifically to the contrary, no title in or to the trust estate or any dividends therefrom shall vest in the beneficiary Germaine D. Hormel, as guardian, or in Thomas D. Hormel, and neither the principal nor any future dividends shall be liable or in any manner chargeable for their debts and they shall have

no power to sell, transfer, encumber or in any manner anticipate or dispose of any interest in the trust estate or any dividends therefrom prior to actual payment or delivery thereof by said trustees to said Germaine D. Hormel as guardian aforesaid.

6. The trust hereby created shall be automatically revoked and shall terminate at the expiration of three years from and after the date hereof or upon the death of the beneficiary Thomas D. Hormel or upon the death of Jay C. Hormel, whichever event occurs first. At no time before the termination of the trust shall said Jay C. Hormel or said co-trustees have the power to re-vest in Jay C. Hormel as beneficial owner any part of the corpus or principal of the trust or trust estate or the income therefrom other than as herein provided, or to revoke, alter or amend this instrument or the trust hereby created.

[fol. 40] 7. The word dividends herein shall be construed to include other income in event the stock certificates deposited at the inception of the trust are sold or substituted by securities other than dividend-bearing stock.

8. The co-trustees shall have power to pay out of the income such reasonable expenses as may be from time to time incurred in administering the trust. Jay C. Hormel shall receive no pay for services as trustee. His co-trustee shall be paid quarterly out of the income such reasonable sums for services as may be agreed upon between the trustees and the beneficiaries.

In Witness Whereof, We have hereto set our hands this 16th day of July, 1934.

JAY C. HORMEL,
PARK DOUGHERTY.

Signed in the Presence of:
Lydia Safranek
S. D. Catherwood

State of Minnesota,
County of Mower—ss:

On this 16th day of July, 1934, before me, a Notary Public within and for said County, personally appeared Jay C. Hormel and Park Dougherty, to me known to be the persons described in and who executed the foregoing in-

strument, and acknowledged that they executed the same as their voluntary act and deed.

LYDIA SAFRANEK,
(Seal) Notary Public, Mower County, Minn.

My commission expires Sept. 1, 1937.

* * * * * * * *

I, Germaine D. Hormel, as guardian on behalf of Thomas D. Hormel, the beneficiary named in the foregoing instrument, hereby acknowledge notice of the execution thereof and receipt of a true copy thereof.

Dated July 16, 1934.

GERMAINE D. HORMEL,
As Guardian of Thomas D. Hormel.

[fol. 41] Exhibit D.

Agreement and Declaration of Trust No. 5.

The undersigned Jay C. Hormel does hereby create and declare the following described trust in the undersigned Park Dougherty and himself as co-trustees for the benefit of Jay C. Hormel, and Germaine D. Hormel, his wife, as guardian for their son James C. Hormel. Jay C. Hormel is the owner of the securities listed in the attached schedule marked Exhibit A. He hereby agrees that said co-trustees shall receive and hold said securities and collect the dividends therefrom as a trust estate in trust for Germaine D. Hormel, as guardian of James C. Hormel, and Jay C. Hormel, as sole beneficiaries, upon the terms and conditions following:

1. All the dividends from the trust estate received during the continuance of the trust hereby created shall be paid by the co-trustees to the beneficiaries on receipt thereof as follows: To Germaine D. Hormel, as guardian aforesaid, for the use and benefit of James C. Hormel, all net dividends up to but not to exceed the sum of $2,000 per year from date hereof, and to Jay C. Hormel all net dividends in excess thereof.

2. Upon the termination of the trust the entire principal or corpus thereof shall be deemed and treated as

property owned absolutely by Jay C. Hormel as of the same time, free and clear of all terms of this trust, and in the event of his decease previous thereto the share that would have reverted to him shall revert to the legatees and devisees of his last will and testament, or to his heirs at law should he leave no will.

3. During the continuance of the trust hereby created, the co-trustees shall retain and have full power and authority to appoint proxies to exercise any and all voting, [fol. 42] powers under any certificates or shares of stock in the trust estate. The resignation of Park Dougherty as co-trustee may be required by the beneficiaries. In that event, or should he for any other reason be unable to act, his successor shall be chosen by agreement between Jay C. Hormel and Germaine D. Hormel, as guardian aforesaid.

4. Said trustees shall not be liable or responsible to the beneficiary Germaine D. Hormel, as guardian aforesaid, or to James C. Hormel for any loss of any kind except in consequence of the wilful and deliberate violation of their duties as trustees herein.

5. Except as otherwise herein provided specifically to the contrary, no title in or to the trust estate or any dividends therefrom shall vest in the beneficiary Germaine D. Hormel, as guardian, or in James C. Hormel, and neither the principal nor any future dividends shall be liable or in any manner chargeable for their debts and they shall have no power to sell, transfer, encumber or in any manner anticipate or dispose of any interest in the trust estate or any dividends therefrom prior to actual payment or delivery thereof by said trustees to said Germaine D. Hormel as guardian aforesaid.

6. The trust hereby created shall be automatically revoked and shall terminate at the expiration of three years from and after the date hereof or upon the death of the beneficiary James C. Hormel or upon the death of Jay C. Hormel, whichever event occurs first. At no time before the termination of the trust shall said Jay C. Hormel or said co-trustees have the power to re-vest in Jay C. Hormel as beneficial owner any part of the corpus or principal of the trust or trust estate or the income therefrom other

than as herein provided, or to revoke, alter or amend this instrument or the trust hereby created.

[fol. 43] 7. The word dividends herein shall be construed to include other income in event the stock certificates deposited at the inception of the trust are sold or substituted by securities other than dividend-bearing stock.

8. The co-trustees shall have power to pay out of the income such reasonable expenses as may be from time to time incurred in administering the trust. Jay C. Hormel shall receive no pay for services as trustee. His co-trustee shall be paid quarterly out of the income such reasonable sums for services as may be agreed upon between the trustees and the beneficiaries.

In Witness Whereof, We have hereto set our hands this 16th day of July, 1934.

JAY C. HORMEL,
PARK DOUGHERTY.

Signed in the Presence of:
Lydia Safranek
S. D. Catherwood

State of Minnesota,
County of Mower—ss:

On this 16th day of July, 1934, before me, a Notary Public within and for said County, personally appeared Jay C. Hormel and Park Dougherty, to me known to be the persons described in and who executed the foregoing instrument, and acknowledged that they executed the same as their voluntary act and deed.

LYDIA SAFRANEK,
(Seal) Notary Public, Mower County, Minn.

My commission expires Sept. 1, 1937.

* * * * * * * *

I, Germaine D. Hormel, as guardian on behalf of James C. Hormel, the beneficiary named in the foregoing instrument, hereby acknowledge notice of the execution thereof and receipt of a true copy thereof.

Dated July 16, 1934.

GERMAINE D. HORMEL,
As Guardian of James C. Hormel.

[fol. 44] (Praecipe for Transcript.)

(Received and Filed August 4, 1939, United States Board of Tax Appeals.)

To the Clerk of the United States Board of Tax Appeals:

You will please prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, copies duly certified as correct of the following documents and records in the above-entiled cause in connection with the petition for review by the said Circuit Court of Appeals for the Eighth Circuit, heretofore filed by the Commissioner of Internal Revenue:

1. Docket entries of the proceedings before the Board;

2. Pleadings before the Board,

(a) Petition, including annexed copy of deficiency letter.

(b) Answer.

3. Opinion and decision of the Board.

4. Petition for review, together with proof of service of notice of filing petition for review and of service of a copy of petition for review.

5. Stipulation of facts filed June 27, 1938, including Exhibits "B", "C" and "D" attached thereto, but ex-
[fol. 45] cluding paragraphs 3, 4, 8, 9 and 11, and Exhibit "A" thereof, which such excluded paragraphs and exhibit are irrelevant and immaterial to the issues on review.

6. Order enlarging time for the preparation of the evidence and for the transmission and delivery of the record.

7. This praecipe.

J. P. WENCHEL, R
Chief Counsel, Bureau of Internal Revenue.

Service of a copy of the within praecipe is hereby admitted this 3rd day of August, 1939.

H. A. MIHILLS,
Attorney for Respondent on Review.

spt. 7-31-39

[fol. 46] (Clerk's Certificate to Transcript.)

United States Board of Tax Appeals

Washington

Commissioner of Internal Revenue, Petitioner,
Docket No. 93572 vs.
Jay C. Hormel, Respondent.

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 45, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeal as above numbered and entitled.

Seal
U. S. Board of
Tax Appeals
1924

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 14th day of August, 1939.

B. D. GAMBLE,
Clerk, United States Board of Tax Appeals.

Filed Aug. 16, 1939, E. E. Koch, Clerk.

[fol. 40] And thereafter the following proceedings were had in said cause in the Circuit Court of Appeals, viz.:

(Appearance of Mr. J. P. Wenchel and Mr. Ralph F. Staubly as Counsel for Petitioner.)

United States Circuit Court of Appeals,
Eighth Circuit.

Guy T. Helvering, Commissioner of Internal Revenue,
Petitioner,
No. 11565 vs.
Jay C. Hormel.

The Clerk will enter our appearance as Counsel for the Petitioner.

J. P. WENCHEL,
Chief Counsel, Bureau of Internal Revenue.

RALPH F. STAUBLY,
Special Attorney, Bureau of Internal Revenue.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Aug. 21, 1939.

[fol. 41] (Appearance of Mr. Samuel O. Clark, Jr., and Mr. Sewall Key as Counsel for Petitioner.)

The Clerk will enter my appearance as Counsel for the Petitioner.

SAMUEL O. CLARK, JR.,
Assistant Attorney General,
Department of Justice,
Washington, D. C.

SEWALL KEY,
Special Assistant to the Attorney General.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Aug. 25, 1939.

(Appearance of Mr. L. W. Post as Counsel for Petitioner.)

The Clerk will enter my appearance as Counsel for the Petitioner.

L. W. POST,
Sp. Asst. to the A. G.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Dec. 11, 1939.

[fol. 42] (Appearance of Counsel for Respondent.)

The Clerk will enter my appearance as Counsel for the Respondent.

R. C. ALDERSON,
S. D. CATHERWOOD,
218 First National Bank Building,
Austin, Minnesota.

Dated November 9, 1939.

Catherwood, Hughes & Alderson,
Of counsel for Respondent,
Austin, Minnesota.

(Endorsed): Filed in U. S. Circuit Court of Appeals, Nov. 13, 1939.

(Order of Submission.)

March Term, 1940.

Monday, March 11, 1940.

This cause having been called for hearing in its regular order, the same was argued by Mr. L. W. Post, Special Assistant to the Attorney General, for petitioner, and by Mr. R. C. Alderson for respondent.

Thereupon, this cause was submitted to the Court on the transcript of the record from said Board of Tax Appeals and the briefs of counsel filed herein.

[fol. 43] (Opinion.)

United States Circuit Court of Appeals,
Eighth Circuit.

No. 11,565.—March Term, A. D. 1940.

Guy T. Helvering, Commissioner of Internal Revenue,
Petitioner,
vs.
Jay C. Hormel,
Respondent.

On Petition to Review Decision of the United States Board of Tax Appeals.

[April 25, 1940.]

Mr. L. W. Post, Special Assistant to the Attorney General (Mr. Samuel O. Clark, Jr., Assistant Attorney General, and Mr. Sewall Key, Special Assistant to the Attorney General, were with him on the brief) for Petitioner.

Mr. R. C. Alderson (Mr. S. D. Catherwood and Messrs. Catherwood, Hughes & Alderson were with him on the brief) for Respondent.

Before Sanborn, Thomas, and Van Valkenburgh, Circuit Judges.

Sanborn, Circuit Judge, delivered the opinion of the Court.

This is a petition to review a decision of the Board of Tax Appeals (39 B.T.A. 244) determining that there were no deficiencies in income taxes of the respondent for the years 1934 and 1935.

Respondent, a resident of Minnesota, (hereinafter referred to as the taxpayer) on July 16, 1934, created three irrevocable short-term trusts for the benefit of his three minor sons. To himself and another, as trustees of each of the trusts, he conveyed shares of stock of Geo. A. Hormel & Co., of which he was an officer. Each trust instrument recited that the trust was created for the benefit of the taxpayer and the benefit of the taxpayer's wife as guardian of the son named therein. The income of each trust up to $2,000 a year was to be paid to the wife as such guardian "for the use and benefit of" her ward, and the income, if any, in excess of $2,000 a year was to be paid to the taxpayer. Each trust was to terminate at the end of three years or upon the earlier death of either the taxpayer or the son named in the trust instrument. Upon the termination of the trusts, the corpus was to belong to the taxpayer or, in case of his death, to his heirs or the persons named in his will. The trustees had authority to appoint proxies to vote the stock held in trust. The trustees were not liable to the guardian, or to the sons, for loss except in case of wilful violation of duty. No title to the trust estates or to prospective dividends therefrom vested in the guardian, nor were the estates or such dividends subject to her debts or those of her wards. The guardian and her wards were prohibited from selling, encumbering or disposing of any interest in the trust estates or any dividends therefrom prior to the actual receipt of the trust income to which they were entitled from the trustees. In case of sale by the trustees of the stock held in trust and the substitution of other securities therefor, the income therefrom was to be trust income.

In each of the years 1934 and 1935 the taxpayer's personal income exceeded one hundred thousand dollars. In his returns for those years he took credit in his exemptions for his three dependent sons, the beneficiaries of the three trusts. He did not include in his gross income for those years the trust income of the three trusts which was paid to the guardian of the three sons under the terms of the trust instruments. Such income was reported in the

returns of the beneficiaries. The Commissioner, however, included all of the income of these trusts in the taxpayer's gross income and assessed a deficiency accordingly. In his deficiency letter, the Commissioner based his action upon §166 of the Revenue Act of 1934 (26 U.S.C. §166; 48 Stat. 680, 729).[1]

The taxpayer appealed to the Board of Tax Appeals. In the proceedings before the Board, the Commissioner relied upon §166 and §167 of the Revenue Act of 1934.[2] The Board decided that neither of these sections was applicable. A minority of the Board members were of the opinion that under §167 the trust income paid to the guardian of the taxpayer's sons was taxable to the taxpayer because it could have been used for relieving him of his obligation to support his children *(Douglas* v. *Willcuts,* 296 U.S. 1) and because the wife had "no interest adverse to petitioner in the distribution of the income from the children's trusts." The Board entered its order on March 28, 1939, determining that there were no deficiencies in income taxes for the years in question.

In his petition for review of the decision of the Board, the Commissioner assigned as error: (1) the ruling of the Board that the entire income of the three trusts was not taxable to the taxpayer; (2) the failure of the Board to rule that such trust income was taxable to him under either §166

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[1] §166. Revocable Trusts.

Where at any time the power to revest in the grantor title to any part of the corpus of the trust is vested—

(1) in the grantor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom, or

(2) in any person not having a substantial adverse interest in the disposition of such part of the corpus or the income therefrom,

then the income of such part of the trust shall be included in computing the net income of the grantor.

[2] §167. Income for Benefit of Grantor.

(a) Where any part of the income of a trust—

* * * * * * *

(2) may, in the discretion of the grantor or of any person not having a substantial adverse interest in the disposition of such part of the income, be distributed to the grantor;

* * * * * * *

then such part of the income of the trust shall be included in computing the net income of the grantor.

(b) As used in this section, the term "in the discretion of the grantor" means "in the discretion of the grantor, either alone or in conjunction with any person not having a substantial adverse interest in the disposition of the part of the income in question.

or §167. The record and briefs were filed in this Court prior to January 1, 1940. In his brief, the Commissioner, under "Specifications of Error to be Urged", stated:

"The Board of Tax Appeals erred:

"1. In holding that the trust income here involved was not includable in the taxpayer's gross income for the years 1934 and 1935.

"2. In not holding that this income was taxable under Sections 166 and/or 167 of the Revenue Act of 1934.

"3. In entering its order of no deficiencies in income tax for the years 1934 and 1935 and in not entering an order that there are deficiencies in the amounts of tax attributable to the trust income here involved."

Under "Points and Authorities", the Commissioner's brief states:

"1. The grantor did not give up sufficient interest in the trust income to avoid taxation under Sections 167 and/or (22a) of the Revenue Act of 1934.[3]

"2. The grantor did not give up sufficient interest in the trust corpus to avoid taxation on income therefrom under Sections 166 and/or 22(a) of the Revenue Act of 1934.

"3. The grantor retained sufficient interest in the income and corpus of the trusts to justify taxing him under Sections 167, 166 and 22(a), considered together and read as a whole."

The taxpayer, in his answering brief, under "Points and Authorities", stated:

"1. Grantor gave up sufficient interest in the trust income to avoid taxation under Sections 167 and/or 22(a) of the Revenue Act of 1934.

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[3] §22. Gross Income.

(a) General Definition.—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *"

"2. The grantor gave up sufficient interest in the trust corpus to avoid taxation on income therefrom under Sections 166 and/or 22(a) of the Revenue Act of 1934.

"3. Grantor did not retain sufficient interest in the income and the corpus of the trust to justify taxing him under Sections 166, 167 and 22(a), considered together and read as a whole."

Under Point 2 the taxpayer cites the case of *Clifford* v. *Helvering*, 8 Cir., 105 F.2d 586, which involved a short-term family trust similar to those here in suit. This Court held in that case that the income from the trust there considered was not taxable to the grantor. Certiorari was granted in that case by the Supreme Court of the United States, and the case was pending in that court at the time briefs in the case at bar were filed in this Court. On February 26, 1940, the Supreme Court filed its decision (*Helvering* v. *Clifford*, ... U.S. .....), reversing this Court and holding that the income from the family trust created by Clifford was sufficiently his income to be taxable to him under §22(a). On the same day the Supreme Court decided *Helvering* v. *Wood*, ... U.S. ....., in which the Circuit Court of Appeals of the Second Circuit had held (104 F.2d 1013) that income from a short-term family trust was not taxable to the grantor. The Supreme Court affirmed on the ground that the Commissioner in the proceedings before the Board had relied solely on §166 and §167 and in the Court of Appeals had expressly waived reliance upon any section other than §166.[4]

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[4]The Supreme Court said:

"For a wholly different reason, petitioner's argument based on §22(a) must fail. The Board of Tax Appeals purported to place its decision solely on §166 and §167 of the Act. Petitioner in his assignments of error specifically mentioned only §166 and §167, not §22(a). In his brief before the Circuit Court of Appeals petitioner expressly waived reliance upon any section other than §166. Though petitioner in his petition for certiorari relied on §22(a), respondent in opposition thereto took the position that that point was not available to petitioner here as it was not raised below. In view of these facts, especially the express waiver below, we do not think that petitioner should be allowed to add here for the first time another string to his bow. As we have indicated, the issues under §166 and §22(a) are not coterminous. Though both deal with concepts of ownership, the range of inquiry under the latter is broad, under the former confined. To open here for the first time and in face of the express disclaimer an inquiry into the broader field is not only to deprive this Court of the assistance of a decision below but to permit a shift to ground which the taxpayer had every reason to think was abandoned in the earlier stages of this litigation. See *Burnet* v. *Commonwealth Improvement Co.*, 287 U.S. 415, 418. It is not apparent why a less strict rule is necessary in order adequately to protect the revenue." (*Helvering* v. *Wood*, ... U.S. ....., ...)

After these decisions of the Supreme Court, the taxpayer filed in this Court a supplemental brief, asserting that, since the Commissioner had not contended before the Board that under §22(a) the trust income from the three trusts in suit was taxable to the taxpayer, and had not expressly mentioned that section in his assignments of error in petitioning for a review or expressly referred to it in his specifications of error in his brief in this Court, the question of the applicability of §166 and §167 was all that was before this Court for review. The Commissioner then filed an answering brief abandoning the contention that §166 was applicable, and asserting that the income from the trusts was for purposes of taxation the income of the taxpayer under §22(a) and §167, and that this Court was not precluded from considering the applicability of §22(a).

It is our opinion that the Board was right in deciding that §167 was not applicable to these trusts. We have no reason to suppose that the laws of Minnesota governing these trusts and the guardianship of the Hormel children would have permitted the guardian to expend for their support trust funds received by her for their use and benefit, since their father was abundantly able to support them. There is no basis for believing that the trusts were created for the purpose of relieving the taxpayer of the obligation of supporting his children or that the trust income belonging to them was or could have been so used. There is no presumption that gifts in trust such as these are in discharge of any obligation for support. *Shanley* v. *Bowers*, 2 Cir., 81 F.2d 13, 15. Moreover, the wife of the taxpayer, as guardian of the minor children, would be strictly accountable to such children for their share of the trust income, and, for that reason, she as guardian had a substantial adverse interest to the taxpayer in the distribution thereof.

The decision of the Board, however, cannot be sustained, in view of *Helvering* v. *Clifford, supra*, if we are at liberty to consider §22(a). There are, we think, no controlling distinctions between the short-term family trusts here in

suit and the trust which was involved in that case. The question of the right of this Court to reverse the Board, which decided correctly the only questions expressly presented to it, is not free from doubt.

The general rule is that a question of law not presented or passed upon below cannot be raised on appeal. *Virtue* v. *Creamery Package Mfg. Co.*, 227 U.S. 8, 38-39; *Duignan* v. *United States*, 274 U.S. 195, 200. This rule is applicable to review of decisions of the Board of Tax Appeals. *Kottemann* v. *Commissioner*, 9 Cir., 81 F.2d 621, 623; *National Contracting Co.* v. *Commissioner*, 8 Cir., 105 F.2d 488, 494. "It is only in exceptional cases, and then only in cases from the federal courts, that questions not pressed or passed upon below are considered here. *Duignan* v. *United States*, 274 U.S. 195." *Blair* v. *Oesterlein Co.*, 275 U.S. 220, 225. An apparent exception to the rule is, that if the decision below is correct it must be affirmed although the lower court relied upon a wrong ground or gave a wrong reason (*Helvering* v. *Gowran*, 302 U.S. 238, 245), and this applies to the review of decisions of the Board of Tax Appeals. *Helvering* v. *Rankin*, 295 U.S. 123, 132-133; *Helvering* v. *Gowran*, *supra*, p. 246. In exceptional cases there may be a reversal by a reviewing court of a decision for reasons not pressed or passed upon below. *Trapp* v. *Metropolitan Life Ins. Co.*, 8 Cir., 70 F.2d 976, affirmed on rehearing 72 F.2d 374, certiorari denied 293 U.S. 596.

In the *Trapp case* the situation was in substance this: A beneficiary brought suit upon a policy of life insurance which the company asserted had lapsed. The question turned upon the construction of certain Missouri statutes. The statutes which the plaintiff expressly relied upon did not sustain her contention that the policy was in force at the time of the insured's death. She did not rely upon §5741 of the Missouri Statutes, because the construction which had been given to that section by the courts of Missouri up to the time of trial made it inapplicable. The District Court properly directed a verdict for the defendant, upon which judgment was entered. The plaintiff appealed

and before the case was presented to this Court the Supreme Court of Missouri construed §5741 in such a way as to make it obvious that the policy in suit was in full force at the time of the insured's death, and that the company actually was indebted to the plaintiff for the face of the policy. After a consideration of the rule now relied upon by the taxpayer for an affirmance, we said (page 982 of 70 F.2d):

"The record made in the court below contains all of the facts essential to a correct determination of this controversy. The instruction of a verdict favorable to the defendant is assigned as error, and section 5741 of the Missouri Statutes, as interpreted by the case of *Gooch* v. *Metropolitan Life Ins. Co., supra.* (Mo. Sup.) 61 S.W.2d 704, is urged upon us as a ground for reversal.

"We regard this case as an exceptional one and analogous to those in which a change of the law after trial has required a reversal of a judgment right when rendered. We have no intention of departing from the general rule that this court will not review questions not presented to nor passed upon by the lower court, but we think it is our duty to recognize the changed situation and 'to give effect to a matter arising since its judgment and bearing directly upon the right disposition of the case.' *Gulf, Colorado & Santa Fe Ry. Co.* v. *Dennis, supra,* 224 U.S. 503, 507, 32 S. Ct. 542, 543, 56 L. Ed. 860."

In this case there is no dispute about the facts. The question of the taxability to the taxpayer of the income of these trusts was in a broad sense before the Board. In its opinion it referred to rulings to the effect that the income of trusts under which there was reserved to the grantor practically all of the substantial benefits as owner were taxable to him.[5] The Board could not, of course, have

[5]The Board in the closing paragraph of its decision sa

"Cases have been presented to the Board involving trusts created for short periods where the grantor has reserved to himself practically all of the substantial benefits as owner of the property, and the Board has held that such trusts are lacking in substance to such an extent that the income is taxable to the grantor. See *Estate of A. C. O'Laughlin,* 38 B.T.A. 1120, and cases there cited. The respondent does not argue that those cases are applicable here and obviously they are not, because here the trusts were not lacking in substance during the three years of their existence."

been expected to anticipate the decision of the Supreme Court in *Helvering* v. *Clifford, supra.* But, because of that decision, we are now advised that the Commissioner was right in determining a deficiency, although the reason given by him for his determination was wrong. We regard the decision of the Supreme Court—rendered after the filing of the opinion and order of the Board—as a matter bearing directly upon the right disposition of this case, and as having created a changed situation which it is our duty to recognize.

The decision of the Board is reversed upon the authority of *Helvering* v. *Clifford, supra.*

[fol. 53] (Decree.)

United States Circuit Court of Appeals,
Eighth Circuit.

March Term, 1940.

Thursday, April 25, 1940.

Guy T. Helvering, Commissioner of Internal Revenue,
Petitioner,
No. 11565. vs.
Jay C. Hormel.

On Petition to Review Decision of United States Board of Tax Appeals.

This cause came on to be heard on a petition to review a decision of the United States Board of Tax Appeals (39 B. T. A. 244) determining that there were no deficiencies in income taxes of the respondent for the years 1934 and 1935, and was argued by counsel.

On Consideration Whereof, and upon the authority of Helvering vs. Clifford, ... U. S. ....., Opinion filed February 26, 1940, It is now here ordered and adjudged by this Court that the decision of the said Board of Tax Appeals in this cause, be, and the same is hereby, reversed, without the taxation of costs in favor of either of the parties in this Court.

And it is further ordered by this Court that this cause, be, and the same is hereby, remanded to the said Board of Tax Appeals for proceedings not inconsistent with the opinion of this Court.

April 25, 1940.

[fol. 54] (Clerk's Certificate.)

United States Circuit Court of Appeals,
Eighth Circuit.

I, E. E. Koch, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the record on petition to review the decision of the United States Board of Tax Appeals as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of all the pleadings, record entries and proceedings including the opinion, had and filed in the United States Circuit Court of Appeals, except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals wherein Guy T. Helvering, Commissioner of Internal Revenue, was Petitioner, and Jay C. Hormel was Respondent, No. 11565, as full, true and complete as the originals of the same remain on file and of record in my office.

I do further certify that on the thirteenth day of May, A. D. 1940, a mandate was issued out of said Circuit Court of Appeals in said cause, directed to the United States Board of Tax Appeals.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this eighteenth day of June, A. D. 1940.

E. E. KOCH,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

(Seal)

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[fol. 55] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 14, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Eighth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(2297)